United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

w/ affidavit

75-7352

To be argued by
PETER C. SALERNO

B Pls

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7352

LE ROY F. GILLEAD,
Plaintiff-Appellant,

—v.—

DEFENSE SUPPLY AGENCY, DEFENSE CONTRACT ADMINISTRATION SERVICES REGION, NEW YORK, M. ROBERT SHAFER, LOUIS J. SCHELTER, JR., NIKITAS C. MANITSAS, PETER J. COUGHTER, SEYMOUR I. MAISEL, and BENJAMIN A. COLLIER,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

PAUL J. CURRAN,
United States Attorney for the Southern District of New York,
Attorney for Appellees.

PETER C. SALERNO,
STEVEN J. GLASSMAN,
Assistant United States Attorneys,
Of Counsel.

✓

TABLE OF CONTENTS

PAGE

Statement of the Case 1

Issues Presented 3

ARGUMENT:

POINT I—The District Court correctly dismissed the complaint for mootness 3

POINT II—The District Court correctly dismissed the class action allegations of the "amended pleading" 5

CONCLUSION 6

TABLE OF AUTHORITIES

Cases:

Caldwell v. *Craighead*, 432 F.2d 213 (6th Cir. 1970), *cert. denied*, 402 U.S. 953 (1971) 4

Carroll v. *Associated Musicians of Greater New York*, 316 F.2d 574 (2d Cir. 1963) 4, 5

Dunn v. *Blumstein*, 405 U.S. 330 (1972) 4

Eisen v. *Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968) 6

Greenstein v. *Paul*, 275 F. Supp. 604 (S.D.N.Y. 1967), *aff'd*, 400 F.2d 580 (2d Cir. 1968) 5

Henderson v. *Defense Contract Administration Services Region, New York*, 370 F. Supp. 180 (S.D.N.Y. 1973) 5

Jeffery v. *Malcolm*, 353 F. Supp. 395 (S.D.N.Y. 1973) 6

PAGE

Moore v. *Ogilvie*, 394 U.S. 814 (1969) 5

Roe v. *Wade*, 410 U.S. 113 (1973) 4

Southern Pacific Terminal Co. v. *ICC*, 219 U.S. 498 (1911) 5

United States v. *W. T. Grant Co.*, 345 U.S. 629 (1953) 5

Rules and Regulations:

41 C.F.R. § 60-1.21 6

Fed. R. Civ. P. 23(a) 5

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7352

LE ROY F. GILLEAD,
Plaintiff-Appellant,

—v.—

DEFENSE SUPPLY AGENCY, DEFENSE CONTRACT ADMINISTRATION SERVICES REGION, NEW YORK, M. ROBERT SHAFER, LOUIS J. SCHELTER, JR., NIKITAS C. MANITSAS, PETER J. COUGHTER, SEYMOUR I. MAISEL, and BENJAMIN A. COLLIER,
Defendants-Appellees.

BRIEF FOR APPELLEES

Statement of the Case

Appellant Le Roy F. Gillead, appearing *pro se*, appeals from an order of the Honorable Lawrence W. Pierce of the United States District Court for the Southern District of New York, filed April 11, 1975, granting appellees' motion to dismiss the complaint for mootness and to dismiss the class action allegations of a purported amendment to the complaint. Judge Pierce's opinion is reproduced at the end of appellant's appendix.

This action was commenced in the District Court by the filing of the complaint and the issuance of a summons on April 12, 1973. The complaint contains 68 numbered

paragraphs, and, as the District Court characterized it, it "is comprised, for the most part, of a broad critique of the manner in which DSA [the Defense Supply Agency] has chosen to implement the equal opportunity program in connection with its contract compliance activities." Slip op. at 2.

When the complaint was filed appellant was an "Equal Opportunity Specialist," involved in such contract compliance activities.

The principal relief sought in the complaint was (1) a declaratory judgment to the effect that the appellees were not properly implementing the equal opportunity program (*i.e.*, the clauses in Government contracts that impose various equal employment opportunity requirements on Government contractors); (2) an injunction requiring appellees to implement the program to appellant's satisfaction; and (3) an injunction directing appellees to refrain from hindering appellant's performance on his job. Complaint, ¶ 68.

In a purported "Amended Pleading" dated July 5, 1973, appellant sought to bring the suit as a class action "in behalf of his colleagues in the Defense Supply Agency (numbering about 200 plus) and all beneficiaries" of the equal opportunity program, *i.e.*, racial and ethnic minorities and women.

Subsequently, on or about September 29, 1973, appellant resigned his position with the Defense Supply Agency. His resignation was voluntary, and was apparently motivated by dissatisfaction with his job and the unsatisfactory resolution of his complaints (Appellant's brief, p. 19).

Since the claims in the complaint arose out of appellant's employment by the Defense Supply Agency, and the

relief sought would only have affected that employment, and since appellant had voluntarily terminated that employment, appellees moved to dismiss the complaint for mootness. Appellees also moved to dismiss the class action allegations on the ground that appellant was not a member of the class of persons protected by the equal opportunity program, and on the ground that as a *pro se* plaintiff he could not adequately represent the interests of any class. Judge Pierce upheld all the appellees' contentions in dismissing the complaint on April 11, 1975.

Appellant filed his notice of appeal on June 9, 1975.

Issues Presented

1. Did the District Court correctly dismiss the complaint for mootness?

2. Did the District Court correctly dismiss the class action allegations?

ARGUMENT

POINT I

The District Court correctly dismissed the complaint for mootness.

Since all the claims in appellant's complaint arose out of his employment with the Defense Supply Agency, and since, now that appellant no longer works for that agency, the relief requested in the complaint would affect only the agency and not the appellant, the District Court properly held that the action was moot. Viewed another way, it can be said that appellant no longer has standing to raise the claims in the complaint.

This case is quite similar to *Carroll* v. *Associated Musicians of Greater New York*, 316 F.2d 574 (2d Cir. 1963). The plaintiffs, who were orchestra leaders and union members, sought to enjoin certain monetary assessments made by the union against them as members. The plaintiffs were expelled from the union after the commencement of the lawsuit, and this Court ruled that since they were no longer required to make the challenged payments, they had no standing to prosecute the action. See 316 F.2d at 575. The Court noted that reinstatement was not sought, and it then approved the following statement by Judge Friendly in an unreported memorandum filed in the case:

> "When the proof showed that the basis for relief alleged in the complaint, to wit, union membership, had ceased, plaintiffs had the burden of showing other circumstances qualifying them for relief."

Id.

In the instant case, there are no "other circumstances" that would justify relief. Appellant quite simply has no present connection with the Defense Supply Agency, and no legally protectable interest in obtaining the relief sought in the complaint. *See also Caldwell* v. *Craighead*, 432 F.2d 213 (6th Cir. 1970), *cert. denied*, 402 U.S. 953 (1971) (suit for, *inter alia*, declaratory and injunctive relief challenging expulsion of student from school; held moot when family moved to another city and student enrolled in another school).

This is not a case where the allegedly wrongful conduct is "capable of repetition, yet evading review", a situation in which the Supreme Court has occasionally refused to invoke the bar of mootness where it might otherwise be applicable. *E.g.*, *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) (abortion); *Dunn* v. *Blumstein*, 405 U.S. 330,

333 n. 2 (1972) (residency requirement for voting); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969); *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). Present members of the appropriate classes are perfectly able, should they be so inclined, to bring actions challenging the Defense Supply Agency's administration of the equal opportunity program. *See Henderson* v. *Defense Contract Administration Services Region, New York*, 370 F. Supp. 180 (S.D.N.Y. 1973).

Since Judge Pierce was clearly correct in ruling that this action was moot upon appellant's voluntary resignation from his position, his decision dismissing the complaint should be affirmed.

POINT II

The District Court correctly dismissed the class action allegations of the "amended pleading".

Judge Pierce's ruling dismissing the class action allegations of appellant's "amended pleading" was also correct. While there are many reasons for this, perhaps the two most obvious are that the appellant is not a member of any legally cognizable class, and he cannot "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

Appellant claimed, in his amended pleading, to represent his then colleagues in the Defense Supply Agency. Since he no longer works for that agency, he is not a member of that class and not a proper representative plaintiff. *See Carroll* v. *Associated Musicians of Greater New York*, *supra*, 316 F.2d at 576 (orchestra leaders suing to enjoin union assessments cannot represent class subject to assessment after expulsion from union); *Greenstein* v. *Paul*, 275 F. Supp. 604, 605 (S.D.N.Y. 1967), *aff'd*, 400 F.2d 580 (2d Cir. 1968).

Appellant also claimed to represent "all beneficiaries" of the equal opportunity clauses of Defense Department contracts, and he in effect described these as all members of ethnic minorities and all women. The class of beneficiaries, however, is much narrower—it is limited to employees of Defense Department contractors or applicants for such employment. 41 C.F.R. § 60-1.21. Appellant does not claim to be a member of this class.

Appellant also cannot adequately represent a class. This Court has specifically stated that "an essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation." *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968). This requirement is unlikely to be met by even a dedicated and intelligent *pro se* non-lawyer plaintiff, as Judge Pierce correctly ruled. *See also Jeffery* v. *Malcolm*, 353 F. Supp. 395, 397 (S.D.N.Y. 1973) (Pollack, J.).

For these reasons, Judge Pierce correctly declined to allow this action to proceed as a class action.

CONCLUSION

The order of the District Court dismissing the complaint, and dismissing the class action allegations of the amended pleading, should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York,
Attorney for Appellees.

PETER C. SALERNO,
STEVEN J. GLASSMAN,
Assistant United States Attorneys,
Of Counsel.

October, 1975

★ U. S. Government Printing Office 1975— 614—350—98

Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

CA 75-7352

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn,
deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 7th day of October 1975 she served ~~a copy~~ two copies of the within govt's brief on appeal

by placing the same in a properly postpaid franked envelope addressed:

LeRoy Gillead,
1236 Burke Ave.
Bronx, NY 10469

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this
7th day of October 1975

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1977